

DECISION

43303
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-209837, B-209761 **DATE:** June 20, 1983

MATTER OF: Larson Building Care Inc.

DIGEST:

Solicitation provision permitting deduction from the contractor's payment where the contractor fails to reperform satisfactorily service found defective by the agency's quality assurance evaluator responding to a customer complaint is not improper under agency regulations as a quality assurance measure.

Larson Building Care Inc. has filed protests under two Air Force invitations for bids to acquire custodial services at Davis-Monthan Air Force Base, Arizona. The protester complains that the Air Force's quality assurance provisions included in invitations for bids Nos. F02601-83-B-0002 and -0003 will impose unwarranted penalties on the successful bidder during performance of the contract. The protester also complains that invitation -0003, set aside for small business concerns, improperly cites negotiation authority whereas the procurement is being formally advertised. We dismiss the protest in part and deny it in part.

The protest first concerns the propriety of provisions permitting the agency to deduct from the contract price liquidated damages for unsatisfactory service based on random inspections by the Air Force's quality assurance evaluator. Larson basically complains that the invitations lump together several tasks for the purpose of deductions, such that the contractor's failure to perform just one of the tasks could result in a deduction for all of them. We recently sustained two protests on this same issue in connection with other Air Force procurements, and made certain recommendations to the Air Force on administration of the provisions Larson complains of, in our decision Environmental Aseptic Services Administration and Larson Building Care Inc., B-207771, et al., February 28, 1983, 62 Comp. Gen. _____, 83-1 CPD 194. The Air Force advises that it is taking action to implement our recommendation

with respect to the invitations under which Larson protests. We therefore see no need to address this aspect of the protest.

Additionally, the protester complains that the invitations contain a provision permitting the Air Force to deduct liquidated damages for the contractor's failure to reperform satisfactorily tasks found defective by the quality assurance evaluator after the evaluator verifies customer complaints. The protester contends that the provision violates Air Force Regulation 400-28, Vol. I, September 26, 1979, which establishes a policy of requiring contractors to institute their own quality assurance programs and of having the Air Force's quality assurance evaluator randomly sample the contractor's performance to assure that the program is operating effectively, with appropriate deductions from the contractor's payments for defects. The contractor generally is permitted a minimum number of defects for which no deductions will be taken.

We disagree with the protester that providing for deductions for reperformance problems after the Air Force's quality assurance evaluator validates customer complaints is inconsistent with Air Force Regulation 400-28, which provides for deductions for reperformance problems after random sampling. On the contrary, the regulation, in section 4-2d, recognizes the necessity of using formal customer complaints for inspection purposes to document certain kinds of service problems (although the regulation notes that because customer complaints are not truly random, they are seldom used to reject a service or to deduct money from the contractor). Thus, the regulation contemplates occasional deductions for validated customer complaints. It does prohibit the use of such complaints to satisfy a random inspection; the invitations in this case, however, keep complaint deductions and random sampling deductions separate and distinct, and thus do not run afoul of this prohibition.

Moreover, in Environmental Aseptic Services Administration and Larson Building Care Inc., supra, we stated that Air Force Regulation 400-28 sets out instructions for the benefit of Government contracting personnel in developing a statement of work and quality assurance plan, and does not create any rights for potential offerors. The agency's alleged violation of the regulation therefore does not provide a valid basis for protest.

We point out that while in the cited decision we did examine the propriety of a liquidated damages provision,

the issue was whether the stipulated damages bore a reasonable relationship to the actual damages the Government could reasonably expect to suffer if performance were deficient. The protester here, however, has submitted no evidence that the deduction provision concerning validated customer complaints imposes an unreasonable measure of damages. The record therefore fails to provide any basis for our objecting to the provision.

Finally, the protester objects to the Air Force's amending invitation -0003 to designate 10 U.S.C. § 2304 (a)(1) (1976) as negotiation authority after the solicitation was issued as an advertised procurement.

There is no legal merit to the protester's objection. The cited negotiation authority simply was required in order to limit the competition to small business concerns. See Defense Acquisition Regulation (DAR) § 1-706.2 (1976 ed.). The procurement method used clearly was small business restricted advertising, a method permitted under that negotiation authority and in which formal advertising procedures are followed to select a contractor from among small business concerns. See DAR §§ 1-706.2, 1-706.5(b). ✓

The protest is dismissed in part and denied in part.

for *Milton J. Arnold*
Comptroller General
of the United States